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Civil Division

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BY ELECTRONIC AND UNITED STATES MAIL

Timothy A. Frazier
Designated Federal Officer
Blue Ribbon Commission on America's Nuclear Future
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington D.C. 20585

Dear Mr. Frazier:

Enclosed is the written statement of Mr. Michael F. Hertz, Deputy Assistant Attorney General, prepared for Mr. Hertz' appearance before the Blue Ribbon Commission for America's Nuclear Future on February 2, 2011. I have also enclosed a copy of Mr. Hertz' biography.

Please contact me at (202) 307-0365, if you have any questions about this matter.

Sincerely,

MARIAN E. SULLIVAN
Senior Trial Counsel
Civil Division

Enclosures

Department of Justice

STATEMENT

OF

MICHAEL F. HERTZ
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

BLUE RIBBON COMMISSION ON
AMERICA'S NUCLEAR FUTURE

PRESENTED ON

FEBRUARY 2, 2011

STATEMENT OF MICHAEL F. HERTZ
DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE
BEFORE THE BLUE RIBBON COMMISSION ON
AMERICA'S NUCLEAR FUTURE
FEBRUARY 2, 2011

Chairman Hamilton, Chairman Scowcroft, and members of the Commission, I am Michael F. Hertz, and I am a Deputy Assistant Attorney General of the Department of Justice, Civil Division. I am pleased to speak with you today regarding the status of litigation concerning the Department of Energy's obligations under the Nuclear Waste Policy Act ("NWPA") of 1982.

Let me note at the outset that much of the litigation about which you have asked the Department of Justice to discuss is still pending in the Federal courts. As a result, the Department's pending matter policy applies to any discussion of those cases. Pursuant to that policy, I will be happy to speak to matters that are in the public record.

Background

In 1983, pursuant to the NWPA, the Department of Energy ("DOE") entered into 76 standard contracts with entities, mostly commercial utilities, that were producing nuclear power. Through the standard contracts, DOE agreed that by January 31, 1998, it would begin accepting spent nuclear fuel and high-level radioactive waste (collectively, "SNF") created by the utilities. In return, the

utilities agreed to make quarterly payments, beginning in 1983, into the Nuclear Waste Fund ("NWF") created by the statute. To date, although utilities continue to pay fees, DOE has not yet commenced accepting SNF. The commencement date for SNF acceptance is currently unknown; however, DOE has repeatedly reiterated its continued commitment to meeting its obligations for accepting and disposing of SNF.

Status Of Court Of Federal Claims Litigation

Utility companies have filed 74 cases in the United States Court of Federal Claims, alleging that DOE's delay in beginning SNF acceptance constituted a partial breach of contract. The Court of Appeals for the Federal Circuit, in *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000), ruled that the delay constituted such a breach.

The Federal Circuit has held that, because the utilities are continuing to perform their obligations under the standard contracts by paying money to the NWF with the expectation of future performance, all claims for breach of the standard contracts are "partial" rather than "total" and damages are only available through the date of the complaints that have been filed. *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369 (Fed. Cir. 2005). To comply with the

applicable statute of limitations, utilities must file new cases with the trial court at least every six years to recover any costs incurred as the result of DOE's delay.

In 2008, the Federal Circuit ruled that DOE was obligated to accept SNF at the rates set forth in a document DOE issued in 1987, prior to the passage of the 1987 amendments to the NWPA, and directed the trial court to apply these rates in determining damages. *Yankee Atomic Electric Co. v. United States*, 536 F.3d 1268 (Fed. Cir. 2008); *Pacific Gas & Electric Co. v. United States*, 536 F.3d 1282 (Fed. Cir. 2008); *Sacramento Municipal Utility District v. United States*, Nos. 2007-5052, -5097, 2008 WL 3539880 (Fed. Cir. Aug. 7, 2008). The rates set forth in this document are higher than the rates that the Government sought to have the trial court apply in determining damages and that are the basis for the settlements entered to date. Absent future settlements, we will continue to litigate these claims until the point at which, after performance begins, DOE accepts the same amount of SNF that it was obligated to accept beginning in 1998 at the acceptance rates determined by the Federal Circuit.

The utilities' damages claims largely consist of the costs incurred to store SNF that they allege DOE would have accepted from them absent the breach -- specifically, storage costs that utilities allege they would not have expended had DOE begun timely performance under the standard contracts at the rate determined

by the Federal Circuit. The costs include the capital costs to construct dry storage facilities or additional wet storage racks, costs to purchase and load casks and canisters and costs of utility personnel necessary to design, license and maintain these storage facilities. We have challenged the utilities' claims for these types of costs to the extent that we believe that the utility would have incurred the costs claimed even if DOE had timely performed its contract obligations.

There are certain categories of alleged damages that numerous utilities have sought that we continue to challenge before the trial and appellate courts. For example, several utilities have alleged damages arising from the alleged "diminution-in-value" of their plants as the result of DOE's delay, claiming that they realized these damages when they sold their plants to other utilities as part of the sale. Other utilities have claimed as damages investments made in Private Fuel Storage, LLC or a portion of the generic fees charged by the Nuclear Regulatory Commission for the regulatory oversight of the plants. Although most trial court decisions have rejected these claims, a few have allowed recovery of such costs. In addition, although we have challenged claims to recover the costs incurred to implement actions mandated by state legislatures as a condition of constructing additional SNF storage, two trial court decisions have permitted recovery of such costs. Finally, most of the utilities claim interest on their costs, which they have

described as “cost of capital” or “cost of debt” claims, and the trial court has largely rejected these interest claims. Because both the Government and the utilities are pursuing appeals to the Federal Circuit on these issues, we expect to receive appellate guidance on the recoverability of these costs in the near future.

Of the 74 lawsuits filed, 49 cases remain pending either in the Court of Federal Claims or the Federal Circuit, 12 have been settled, seven were voluntarily withdrawn, and six have been litigated through final unappealable judgment. Of the 49 pending cases, the trial court has entered judgment in 22 cases, all of which are pending on appeal. Eight of the 74 cases represent “second-round” claims -- that is, claims by plaintiffs who had already filed a lawsuit seeking damages incurred prior to the date that they filed their complaints, but who seek recovery for additional expenditures incurred after the period covered by their first cases. To date, the plaintiffs’ claims total $6.4 billion, although we have not been provided with dollar figures in six cases.

The Government’s liability for judgments that have already been entered (most of which are not final because of appeals or remands) and settlements currently stands at approximately $2.2 billion. This amount covers approximately 65 percent of the claim-years of liability (that is, the total number of individual years in which individual contract-holders could seek damages for DOE’s failure

to accept SNF) that accrued between January 31, 1998, and the end of 2009. In total, the Government has paid approximately $956 million pursuant to settlements and two trial court judgments that were not appealed. In addition to the approximately 35 percent of the claim-years through 2009 that are not already the subject of settlements or judgments, additional Government liability will accrue for as long as DOE is delayed in commencing SNF acceptance at contractually required rates.

The following chart depicts the progression of SNF cases through trial and to appeal:

Status	**January 2011**
Voluntarily withdrawn	7
Settled	12
Final unappealable judgments	6
Final judgments on appeal	22
Pending before the trial court	27
Total	74

The Department of Justice has conducted 27 SNF trials through the end of 2010. Barring settlements, we currently estimate that we will conduct an additional 12 trials before the end of 2012. Because the plaintiffs are suing for partial breach, we also anticipate that, absent settlement, the number of pending cases will increase as additional utilities file second-round claims.

Settlements

While asserting legitimate defenses to plaintiffs' claims in litigation, we also have made concerted efforts to settle claims. The settlements entered to date resolving claims in 12 of the cases involve seven companies: Exelon Generation, LLC; South Carolina Electric & Gas Company; Omaha Public Power District; Duke Power Company; Florida Power & Light Company; PSEG Nuclear LLC; and Dominion Energy Kewaunee, Inc. These settlements provide for the periodic submission of claims to the contracting officer for costs incurred since the date of the last submission. The Government will continue paying the utilities' claims pursuant to these existing settlements until, after performance begins, DOE accepts the same amount of SNF that it was obligated to accept beginning in 1998 at the rates set forth in the settlement agreement.

We have also conducted discussions with the utilities as a group to explore the possibility of reaching a standard settlement with a larger segment of the utilities whose claims are currently pending. Because many of the major recurring issues have been resolved as the cases have worked their way through trial and the appellate process, the ultimate success of many types of claims is now more predictable to both the Government and the utilities. We have proposed to the utilities that we enter into settlements that pay them for their legitimate claims to

date and provide for an administrative process to resolve their claims for costs incurred through December 31, 2013, by which time the Administration will have the Commission's recommendations. Because the claims of a substantial number of the utilities are not substantially affected by issues that require resolution at the appellate level, it may be possible to implement an administrative claims process with these utilities that is less expensive and more efficient than litigation and that achieves largely the same results.

Payment Of Judgments And Settlements

To date, all payments to the utilities have come from the Judgment Fund, which is a permanent, indefinite appropriation for the payment of judgments against the United States. 31 U.S.C. §1304. In *Alabama Power Co. v. United States Department of Energy*, 307 F.3d 1300 (11th Cir. 2002), the Court of Appeals for the Eleventh Circuit ruled that the Government could not use the NWF to pay for any of the damages that the utilities incur as a result of DOE's delay because on-site storage is not one of the uses of the NWF authorized by the NWPA. DOE has not otherwise been required to reimburse the Judgment Fund for judgments paid. The only other available funding source that has been identified to date is the Judgment Fund. Although Congress provided in the NWPA that utilities and their ratepayers would be responsible for paying for the storage of

SNF, at least currently a substantial portion of those storage costs are being paid by the taxpayers, through the Judgment Fund.

Litigation Costs

The costs to the Government to litigate these cases are significant. Through the end of 2010, the Department of Justice has expended approximately $112 million in expert funds and $56 million in litigation support costs in defense of these suits. These expenditures, as well as the resources for attorney time, have been paid from regular Department of Justice appropriations. In addition, DOE has expended many personnel hours to support this effort. Absent settlement, these litigation costs will continue to be incurred into the foreseeable future, just as, until DOE begins SNF acceptance (or other suitable arrangement is made with the industry), the Government's underlying liability will continue to accrue until after DOE's performance catches up with its performance obligations from 1998.

Continuing Liability

In 2010, DOE estimated the potential liability for the delays in performing its obligations to be $16.2 billion, extrapolating from the settlement payments to date and assuming performance begins in 2020. This is an increase from DOE's 2009 estimate, when it believed the potential liability to be $13.1 billion. The settlement payments upon which the current estimate is based assume a lower rate of SNF

acceptance than the Federal Circuit has determined to be the measure of the Government's obligation beginning in 1998 and do not encompass costs that may be unique to the utilities with which the Government has not settled. Conversely, the current estimate may not fully account for the Government's potential defenses or the possibility that plaintiffs will not be able to prove the full extent of their claims.

The Government's liability for breach of contract damages will likely continue until DOE begins acceptance of spent fuel in accordance with the provisions of the Standard Contract and for some significant period thereafter. DOE's future performance will be shaped by the recommendations of the Commission. Any recommendations of the Commission, such as regional interim storage, that allow DOE to begin dealing with its SNF acceptance and disposal obligations and accept SNF at a faster rate than the acceptance rate that the Federal Circuit has identified may assist in limiting or reducing the Government's liability. Pursuit of these recommendations may require the expenditure of additional project funds, expenditures that DOE or others appearing before the Commission may be able to estimate.

In developing its recommendations, the Commission must take into account the existing obligations of the Government. Because the NWPA required DOE to

enter into contracts with the owners and generators of SNF, rather than merely create a statutory program, changes in the program, even if directed by a statutory change, can potentially cause further breaches of contract, which then can create additional monetary liability. For example, if the Commission were to recommend that the NWPA be amended to provide authority for the Government to take title at decommissioned nuclear plants, but did not include authority to take title to the land upon which the storage site is located, the Government arguably could be subject to takings claims from the utilities if DOE could not immediately remove the SNF to which it took title from a particular site. The Commission should be mindful that any recommendations that alter the existing bargain between the parties could dramatically affect the monetary damages that the United States might have to pay the utilities and could even, depending on the changes made, lead to a total breach of the contract.

Cases Before The Court Of Appeals For District Of Columbia Circuit

Two cases related to DOE's obligation to accept SNF have been filed recently before the United States Court of Appeals for the District of Columbia Circuit. Those cases do not directly implicate the breach of contract cases in the Court of Federal Claims and the Federal Circuit, but could have some effect upon the issues likely to arise during the litigation.

In *National Association of Regulatory Utility Commissioners v. United States Department of Energy* (D.C. Cir.), two industry groups and several nuclear reactor owners filed petitions, which were consolidated, challenging the continued collection of NWF fees absent a fee adequacy review after the Administration terminated the Yucca Mountain program. By decision dated December 13, 2010, the District of Columbia Circuit dismissed the petitions, holding that the petitions were moot, in part, because DOE issued a fee review for 2009 in November 2010. The District of Columbia Circuit also held that the petition requesting that the court suspend the collection of the fee were not ripe because any review of the amount of the fee could only be made as part of a challenge of the statutorily-required annual fee assessment that the NWPA requires the Secretary to undertake.

In *In Re Aiken County* (D.C. Cir.), which is being handled by the Environment and Natural Resources Division of the Department, the States of South Carolina and Washington, a county in South Carolina, and three individuals are seeking review of, among other things, the Secretary of Energy's decision to move to withdraw the license application for the Yucca Mountain site as a permanent repository for nuclear waste. The District of Columbia Circuit has consolidated the various petitions and scheduled argument for March 22, 2011.

MICHAEL F. HERTZ

Michael F. Hertz is a Deputy Assistant Attorney General in the Civil Division, United States Department of Justice, Washington, D.C. 20530, and has served continuously with the Justice Department for over 30 years. As Deputy Assistant Attorney General for the Commercial Litigation Branch Mr. Hertz oversees the Corporate and Financial Litigation, Civil Fraud, Intellectual Property, and National Courts sections and the Office of Foreign Litigation.

Mr. Hertz was born on September 16, 1949 in New York, New York, and raised and educated in Roslyn, New York. Upon graduating in 1971 from Rensselaer Polytechnic Institute, Mr. Hertz attended Northwestern University School of Law, where he was elected to the Order of the Coif and graduated magna cum laude in 1974. After completing a clerkship with the late Judge Robert A. Sprecher of the United States Court of Appeals for the Seventh Circuit, Mr. Hertz joined the Civil Division's Appellate staff in October 1975. Mr. Hertz was awarded the Department of Justice's John Marshall Award for handling appeals in July 1981, the Attorney General's Distinguished Service Award in July 1988, the Stanley D. Rose Memorial Award, the Civil Division’s highest ranking award in 2002 and Presidential Rank Awards for Senior Executives in 1989, 1997 and 2006. He was appointed to the Senior Executive Service as the Civil Division's Appellate Litigation Counsel in May 1982, promoted to Director, Commercial Litigation Branch in charge of civil fraud litigation in March 1984, and Deputy Assistant Attorney General in March 2007.